



# **Regulation of Speech on Social Media**

**An introduction**

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# Outline

- **Constitutional Considerations**
  - 1<sup>st</sup> Amendment
  - Preemption
  - Commerce Clause
- **Utah Approach**
- **Other State Approaches**



# The First Amendment

**“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”**

- Applies only to the government regulation of speech, not to private regulation of speech
- **Manhattan Community Access Corporation v. Halleck, 139 S.Ct. 1921 (2019): “[A] private entity may qualify as a state actor when it exercises ‘powers traditionally exclusively reserved to the State.’ It is not enough that the federal, state, or local government exercised the function in the past, or still does. And it is not enough that the function serves the public good or the public interest in some way.”**



# Preemption

## Article VI, Paragraph 2:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.



# Preemption

## **47 U.S. Code Sec. 230(c):**

- (1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
- (2) Civil Liability. No provider or user of an interactive computer services shall be held liable on account of:
  - (A) Any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
  - (B) Any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

## **47 U.S. Code Sec. 230(e):**

- (3) State Law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.



# Commerce Clause

**Article 1, Section 8, Clause 3:**

**Congress shall have the power ... to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.**

**“Dormant” Commerce clause**

**Implicit prohibition against states from passing legislation that discriminates against or excessively burdens interstate commerce.**



# Dormant Commerce Clause

## **Strict scrutiny analysis:**

- Compelling state interest
- That interest cannot be adequately served by reasonable nondiscriminatory alternative means

## **Applies if:**

- a law on its face mandates different treatment of in-state and out-of-state commerce
- a law controls commerce occurring wholly outside the boundaries of the state
- (Maybe) the effect or purpose of the law is to burden interstate commerce

## **Balancing test analysis: (Pike v. Bruce Church, Inc. 397 U.S. 137 (1970))**

- Does law pose a significant burden on interstate commerce?
- Are the benefits of the law sufficient to outweigh the burdens?

# Utah Proposals







# Utah Legislation 2021 GS

- **SB 228 (vetoed)**

- Requires social media corporations to give notice of their moderation practices
- Creates appeal process when content moderated
- Requires social media corporations to give notice when they moderate certain types of content
- Allows state to enforce when social media corporations violate their own moderation practices

- **HJR 19 (proposed)**

- Resolution asking for investigation into censorship practices
- Suggested the legislature conduct a study on the issue

# Other State Approaches





# Approach 1: Private Cause of Action

- **Policy:**
  - Draft legislation that imposes state liability for some moderation behavior
- **Obstacles:**
  - 1<sup>st</sup> Amendment
  - Preemption
  - Commerce Clause
- **Examples:**
  - Stop Social Media Censorship Act (Mississippi HB 0544)
  - Free Speech State (North Dakota HB1144)
  - Define social media corporation as publisher (West Virginia SB369)



# Option 2: Taxation

- **Policy:**

- Tax entities that engage in certain behavior

- **Obstacles:**

- Potential commerce clause or first amendment issues
- What do we tax? The product is offered for free, so the burden may be more on Utah businesses selling ad space than on the platform

- **Examples:**

- No tax credits for social media corporations that censor (Iowa SF 580)
- Require local governments to determine which companies are receiving tax credits (Alabama HB 213)



# Option 3: Require Transparency

- **Policy:**

- Require companies that operate in the state to more clearly disclose their moderation practices

- **Obstacles:**

- Still raises 1<sup>st</sup> Amendment and Commerce clause questions
- Drafting in a way that would survive commerce clause analysis (would be important to know actual technical limitations)

- **Examples:**

- Utah SB 228
- Deceptive trade practice approach (Arkansas HB 1657)



# Option 4: Political Speech

- **Policy:**

- Prohibit social media corporations from censoring political speech

- **Obstacles:**

- 1<sup>st</sup> Amendment
- Preemption

- **Examples:**

- Private cause of action and fines for de-platforming political candidates (Florida SB 7072)
- Private and public cause of action for censoring content based on viewpoint (Texas HB 20)